(3)

No. 02-871

Supreme Court, U.S.
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In The

Supreme Court of the United States

RONEN JACK AMIR,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The First Judicial District Of Texas

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment's prohibition against general exploratory search warrants is violated when peace officers bring a drug-detecting dog to participate in a search when drugs are not among the items specified for seizure in the search warrant?

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ARGUMENT

There are three compelling reasons why certiorari in this case is warranted. First, Respondent does not, because it cannot, distinguish this Court's decision in *Wilson v. Layne*, 526 U.S. 603 (1999), and defuse the argument that the drug dog's presence inside his bedroom was wholly unrelated to the objectives of the intrusion authorized by the search warrant. Second, this case presents this Court with an appropriate vehicle to resolve an important and recurring federal constitutional question that has evaded review in this Court because Texas is one of few States that does not recognize the doctrine of inevitable discovery promulgated by this Court. See *Nix v. Williams*, 467 U.S. 431, 444 (1984). And third, left unchecked, the decision below presents an unacceptable risk that any police officer executing any search warrant for non-narcotics evidence can and will expand the scope of the search into a search for narcotics by unilaterally adding a drug-detecting dog to the raid team without the intervention of a neutral and detached magistrate.

I.

In *Wilson v. Layne*, 526 U.S. at 611, this Court held that "the Fourth Amendment does require that police actions in execution of the warrant be related to the objectives of the authorized intrusion." Respondent cannot argue that the drug dog is related to the objectives of the search for counterfeit clothing and business records and instead seeks to distinguish *Wilson* because it is a civil matter involving a monetary suit for damages and not a criminal case involving the application of the exclusionary rule. *Resp. Brf.* at 10. This overly simplistic view of *Wilson* turns a blind eye to the fact that this principle that police

actions in execution of the warrant be related to the objectives of the authorized intrusion is drawn from this Court's decision in *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Respondent's contention that *Wilson* is inapposite because it is a civil case has also been rejected by at least one Circuit. See *United States v. Hendrixon*, 234 F.3d 494, 496-497 (11th Cir. 2000) (finding Fourth Amendment violation in criminal case where police violated rule in *Wilson* by permitting third party into residence during execution of search warrant).

In *Wilson*, this Court also held that "it is a violation of the Fourth Amendment for police to bring members of the media or *other third parties* into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." (emphasis added). Respondent seeks to justify the drug dog's presence inside Petitioner's bedroom by claiming that the dog was not a "third party" present during execution of the search warrant in the face of the contrary holding in *Wilson* because the dog "was a part of the Houston Police Department, and was authorized to be present . . . as would any other member of the police force." *Resp. Brf.* at 10. Respondent goes on to argue that "[c]anine units are an intrinsic part of modern police work" who "routinely assist police officers in a wide variety of tasks." *Id.* Aside from its failure to develop this claim in either the trial court or the court of appeals, Respondent also fails to acknowledge that when the dog's handler was asked by the trial judge why the dog was present during the search, he replied, "*I have no idea, Your Honor.*" *Pet. App.* at 8. (emphasis added). Respondent also claims that "there is no similarity between a police canine unit and the civilians who accompanied police officers in *Wilson*."

Resp. Brf. at 11. To the extent that the civilians in *Wilson* were unable to detect the presence of cocaine in a closed container at the searched premises on the strength of their sense enhancement,[1] this argument is utterly devoid of merit. Because the drug dog in this case was no more related to the objectives of the intrusion authorized by the magistrate than the civilians in *Wilson*, this Court should grant certiorari to determine whether the drug dog's presence without any prior judicial authorization violated the Fourth Amendment.

Respondent attempts to amplify this claim by contending that the "canine was simply an investigative tool" no different from a flashlight, camera, or the like citing this Court's decision in *United States v. Knotts*, 460 U.S. 276 (1984). This claim ignores the holding in *Knotts* that the installation of a beeper to track the defendant's vehicle was not a Fourth Amendment violation because, "A person traveling in an automobile on *public thoroughfares* has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281. (emphasis added). Respondent's argument mistakenly commingles the reasonable and well recognized level of privacy this Court has long held one enjoys in their home with the diminished expectation of privacy one expects in a public setting. It strains credulity for Respondent to claim that the difference

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[1] See *State v. Dearman*, 962 P.2d 850, 853 (Wash.App. Dist. 1, 1988) ("Like an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to see through the walls of the home."); *State v. Pellicci*, 580 A.2d 710, 716 (N.H. 1990) (canine sniff is a search under state constitution because dog discerned something not otherwise apparent to officers through their own senses).

between a dog sniff in the bedroom of Petitioner's residence and a dog sniff in a public place is "a distinction without a difference," *Resp. Brf.* at 13, when principled respect for the sanctity of the home has long animated this Court's Fourth Amendment jurisprudence. See e.g., *Wilson v. Layne*, 526 U.S. at 610 ("the Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home"); *Payton v. New York*, 445 U.S. 573, 601 (1980) (emphasizing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"); *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity of the criminal law"). Moreover, Respondent does not, because it cannot, reconcile its myopic view on dog sniffs in non-public places with the contrary views of Professor LaFave,[2] the three dissenting judges on the Court of Criminal Appeals,[3] the Second Circuit Court of Appeals,[4] or the Supreme Courts of

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[2] See *Pet. App.* at 16 n. 7.

[3] See *Pet. App.* at 4-5.

[4] See *United States v. Thomas*, 757 F.2d 1359, 1367 (2nd Cir. 1985). Respondent argues that the court of appeals "accurately distinguished *Thomas* . . . because there is evidence in the record that *the officer would have searched the safe for business records* . . . regardless of the narcotics dog's alert." *Resp. Brf.* at 15 (emphasis added). Respondent, however, ignores the fact that this record is silent as to whether police would have searched the night stand for business records, see *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (*plurality opinion*), or that it was objectively reasonable for police to believe that business records could have even fit within the night stand. See *United States v. Ross*, 456 U.S. 798, 824 (1982).

Nebraska,[5] Pennsylvania,[6] New York,[7] New Hampshire,[8] and appellate courts in Alaska[9] and Washington.[10]

Respondent's argument that the drug dog's presence and ultimate detection of the cocaine inside Petitioner's bedroom night stand neither implicated nor violated the Fourth Amendment also turns a blind eye to *Bond v. United States*, 529 U.S. 334, 338 (2000), where this Court held that the defendant had a legitimate expectation of privacy that his bag – placed on the luggage rack of a bus – would not be felt in an exploratory manner even if the general public touched it. Petitioner's situation is more compelling; he certainly did not expect the intrusion into his bedroom of a drug sniffing dog when police made no effort to convince a neutral and detached magistrate that there was probable cause that drugs could be found anywhere in the premises to be searched, let alone in his bedroom night stand. *Bond* also makes it clear that physical inspection is more intrusive than a purely visual inspection and the sensory enhancement the dog brought

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[5] See *State v. Ortiz*, 600 N.W.2d 805, 815 (Neb. 1999) (canine sniff a search under state constitution).

[6] See *Comm. v. Johnston*, 530 A.2d 74, 79 (Pa. 1987) (same).

[7] See *People v. Dunn*, 564 N.E.3d 1054, 1058 (N.Y. 1990) (canine sniff in apartment hallway a search under state constitution).

[8] See *State v. Pellicci*, 580 A.2d 710, 716 (N.H. 1990) (canine sniff is a search under state constitution because dog discerned something not otherwise apparent to officers through their own senses).

[9] See *Pooley v. State*, 705 P.2d 1293, 1310-1311 (Alaska App. 1985) (same).

[10] See *State v. Dearman*, 962 P.2d 850, 853 (Wash.App. Dist. 1, 1988) ("Like an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to see through the walls of the home.").

to bear was not a purely visual inspection. Indeed, the drug dog did not merely sniff the night stand but actually opened it, the epitome of physical inspection violative of the Fourth Amendment denounced in *Bond*.[11]

Only by trivializing the dog's presence in Petitioner's bedroom can Respondent avoid the core issue before this Court: whether the dog's very presence violated the Fourth Amendment's prohibition against general exploratory searches. Accordingly, this Court should grant certiorari to resolve the fundamental question of whether the Fourth Amendment's guarantee of personal security and privacy in one's home, indeed, in one's bedroom, must yield to the unilateral decision of police to introduce a sensory enhancement element that constitutes a separate search without the intervention of a neutral and detached magistrate.[12] See *Comm. v. Martin*, 626 A.2d 556, 561 (Pa. 1993)

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[11] Respondent's claim that the cocaine was admissible under the plain view exception once the drug dog opened up the night stand, *Resp. Brf.* at 9, will not support the weight rested upon it. This Court has made it clear that even if police are inside a suspect's home on the basis of a legal warrant, they cannot search or seize objects in plain view that are unrelated to the suspected crime that is the subject of the warrant without probable cause as to those items. *Arizona v. Hicks*, 480 U.S. 321, 326-328 (1987).

[12] Respondent's argument that this Court's decision in *United States v. Place*, 462 U.S. 696 (1983), resolved for all time the question of whether a dog sniff in a non-public place can ever be a search proves too much. *Resp. Brf.* at 12-13. Aside from the fact that three Justices felt that the majority's discussion of the use of drug detecting dogs was *dicta*, *id.* at 719-720, at least one Circuit has cautioned that, "*Place* obviously did not sanction the indiscriminate blanket use of trained dogs in all contexts." *United States v. Whitehead*, 849 F.2d 849, 857 (4th Cir. 1988).

("A free society cannot remain free if police may use drug detection dogs without restraint.").

Finally, the cornerstone of Respondent's defense of the judgment below, the oft-repeated refrain that Petitioner had no reasonable expectation of privacy in possessing the cocaine in his bedroom night stand based upon its myopic interpretation of *United States v. Jacobsen*, 466 U.S. 109, 123 (1984), *Resp. Brf.* at 14, 16, 18, collapses of its own weight. A careful reading of *Jacobsen* reveals this Court did not say anywhere near that which Respondent attributes to it. This Court merely held that under the facts of that case – where the contraband had already been exposed to the public – testing it to determine if it was cocaine did not violate a reasonable expectation of privacy. But where, as here, police are only able to be in a position to test the substance because of conduct that violates a reasonable expectation of privacy, such as the reasonable expectation of privacy that Petitioner had in the night stand, then *Jacobsen* does not insulate that conduct from condemnation as a violation of the Fourth Amendment. As this Court noted some sixty-five years ago in *Johnson v. United States*, 333 U.S. 10, 14 (1948) (emphasis added):

> Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and *the law allows such crime to be reached on proper showing.* The right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security. *When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.*

II.

This case also presents this Court with the appropriate vehicle to resolve an important and recurring federal constitutional question that has and will likely continue to evade review in this Court[13] because Texas is one of few States that does not recognize this Court's teachings as to the doctrine of inevitable discovery. See *Garcia v. State*, 829 S.W.2d 796, 798 (Tex.Crim.App. 1992) ("Thus, to the extent that Texas law provides an independent basis for the exclusion of evidence, the inevitable discovery exception approved by the United States Supreme Court is simply irrelevant."). In virtually any other State and in all of the federal Circuits, see *Nix v. Williams*, 467 U.S. at 440 n. 2 ("the vast majority of all courts, both state and federal, recognize an inevitable discovery exception to the exclusionary rule"), the fact situation presented in this case would not warrant certiorari because prosecutors could argue that the cocaine in the night stand would have been inevitably discovered regardless of the dog's sniff. The absence of inevitable discovery in Texas and the Houston Police Department's exploitation of "the power of technology to shrink the realm of guaranteed privacy," *Kyllo v. United States*, 533 U.S. 27, 33 (2001), to perform an end run around the Fourth Amendment's prohibition against general exploratory searches presents this Court with the appropriate vehicle to resolve a cutting-edge

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[13] Of course, another reason why this exact question has never come before this Court is that virtually all police and prosecutors apparently recognize that the Fourth Amendment's prohibition against general exploratory searches would not permit a drug-sniffing dog to participate in a search when drugs are not among the items specified for seizure in the search warrant.

constitutional question while reaffirming its deeply-felt belief that, "Those suspected of drug offenses are no less entitled to [Fourth Amendment] protection than those suspected of nondrug offenses." *United States v. Karo*, 468 U.S. 705, 717 (1984).

III.

Ultimately, Respondent's attempt at defending the judgment below boils down to its jerry-rigged contention that the fundamental right to privacy that we enjoy in the bedrooms of our homes is a legal fiction whenever a drug sniffing dog is unilaterally introduced into the mix by law enforcement without any prior judicial authorization. Left unchecked, the decision below presents a constitutionally unacceptable risk that any police officer executing any non-narcotics search warrant can and will transform it into a general exploratory search warrant for narcotics in violation of this Court's myriad decisions to the contrary. See e.g., *Wong Sun v. United States*, 371 U.S. 471, 481-482 (1963) (Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . "); *Katz v. United States*, 389 U.S. 347, 357 (1967) ("Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes."). It is of little moment that the court of appeals' decision sanctioning this scenario was unpublished when the Court of Criminal Appeals' decision denying review over the vigorous dissent of three judges was not. The holding in this case is of precedential value to law enforcement agencies throughout Texas even if Respondent is correct that this decision is not found in the pages of Southwestern Reporter.

The decision below is a new and unwarranted exception to the warrant requirement that stands this Court's holding in *Johnson* on its head and does not find support in this Court's Fourth Amendment jurisprudence. It is a dangerous position that can only be addressed by this Court granting this petition for certiorari.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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